STATE OF MICHIGAN

COURT OF APPEALS

BANK ONE NATIONAL ASSOCIATION,

Plaintiff-Appellee,

v

FRANK A. VENTIMIGLIO, BRANDA M. VENTIMIGLIO, and PARAMOUNT BANK,

Defendants/Third Party Plaintiffs-Appellants,

and

MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC.,

Defendant-Appellant,

and

DIANE MAGNOLI and MICHAEL A. MAGNOLI,

Third Party Defendants.

UNPUBLISHED
April 2, 2009

No. 283824
Macomb Circuit Court
LC No. 2006-003118-CH

Before: Cavanagh, P.J., and Fort Hood and Davis, JJ.

PER CURIAM.

Defendants appeal as of right from the trial court's order granting plaintiff's motion for summary disposition. We affirm, finding that the trial court reached the right result for the wrong reason. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Jimmy and Diana Reynolds entered into a land contract to buy the real property here at issue ("the house") from Michael Magnoli's construction company ("the Company") for $250,000. According to Magnoli's affidavit, the Reynoldses decided to get bank financing[1] for

[1] Plaintiff is the successor in interest of that bank.

the land contract and also to get extra cash to pay creditors. They agreed to use the proceeds of the bank loan to pay $170,000 of the land contract and to then give the Company a mortgage for $50,000 (the amount remaining on the land contract). The Reynoldses closed on their bank loan on August 20, 1998, and had a right to cancel that expired at midnight on August 25, 1998. They executed the $50,000 mortgage to the Company also on August 20, 1998. That mortgage was titled "second mortgage" in recognition of the bank's mortgage as being the first mortgage. On August 24, 1998, the Company granted the house to the Reynoldses by warranty deed. The deed did not note any exceptions. The Reynoldses did not cancel the bank loan, and the transaction with the bank took effect on August 26, 1998. The Company conveyed the deed and an affidavit of indemnity identifying the land contract to the title company handling the transaction, and received its $170,000 payoff in return. The Company recorded its $50,000 mortgage on September 11, 1998, and the bank recorded its mortgage on October 6, 1998. The Reynoldses defaulted on both mortgages. The Company's mortgage was foreclosed and the house was sold at a sheriff's sale on November 8, 2002; the Magnolis bought the house at the sheriff's sale. About one month later, the bank's mortgage (which by that time had been assigned to plaintiff) was foreclosed and a second sheriff's sale of the same house was held; the bank bought the house. In 2004, the Magnolis sold the house by warranty deed to defendants the Ventimiglios, who gave the corporate defendants a mortgage on the house. Plaintiff sued to quiet title.

Both sides moved for summary disposition under MCR 2.116(C)(10) (no genuine issue of material fact). The trial court decided the motions without oral argument, ruling in favor of plaintiff and against defendants. The trial court first noted that defendants' interests hinged on the $50,000 mortgage from the Company to the Reynoldses, and concluded that that mortgage had been extinguished by the warranty deed from the Company to the Reynoldses because it was not noted as an exception on the deed. Because the Company's mortgage was not recorded at the time the deed was conveyed, there was no constructive notice of its existence. Finally, the trial court noted that MCL 565.151 provides:

> That any conveyance of lands worded in substance as follows: "A.B. conveys and warrants to C.D. (here describe the premises) for the sum of (here insert the consideration)," the said conveyance being dated and duly signed, sealed and acknowledged by the grantor, shall be deemed and held to be a conveyance in fee simple to the grantee, his heirs and assigns, with covenant from the grantor for himself and his heirs and personal representatives, that he is lawfully seized of the premises, has good right to convey the same, and guarantees the quiet possession thereof; **that the same are free from all incumbrances**, and that he will warrant and defend the title to the same against all lawful claims. [Emphasis added by the trial court.]

The court concluded, "Therefore, Bank One was entitled to assume that the property was free and clear of all other mortgages, especially in the absence of any language in the warranty to the contrary."

We review de novo a trial court's decision to grant or deny a motion for summary disposition. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). We must review the record in the same manner as must the trial court to determine whether the movant was entitled to judgment as a matter of law. *Morales v Auto-Owners Ins*, 458 Mich 288, 294; 582 NW2d 776 (1998). Our review is limited to the evidence that had been presented to the

trial court at the time the motion was decided. *Peña v Ingham Co Rd Comm*, 255 Mich App 299, 313 n 4; 660 NW2d 351 (2003).

The trial court erred when it concluded that the warranty deed discharged the Company's mortgage. The failure of a warranty deed to identify encumbrances does not nullify an existing encumbrance; it instead gives the grantee a cause of action against the grantor for breach of the covenant. See, e.g., *Reed v Rustin*, 375 Mich 531; 134 NW2d 767 (1965). However, although the trial court erred in granting plaintiff summary disposition for the reasons it gave, our review of the record supports plaintiff's case for a different reason. Michigan's "race-notice" recording statute, MCL 565.29, provides in relevant part:

> Every conveyance of real estate within the state hereafter made, which shall not be recorded as provided in this chapter, shall be void as against any subsequent purchaser in good faith and for a valuable consideration, of the same real estate or any portion thereof, whose conveyance shall be first duly recorded.

Thus, a party having notice of a prior unrecorded mortgage is not a good-faith purchaser under this statute and cannot take advantage of the protection it offers good-faith purchasers. *Michigan Nat'l Bank & Trust Co v Morren*, 194 Mich App 407, 410-411; 487 NW2d 784 (1992). The Magnoli affidavit explained the sequence of events and that the Company's mortgage was signed as part of the closing transaction; the Magnolis were fully aware of the bank's prior mortgage so the Company was not a good-faith purchaser and the bank's first mortgage has priority over the Company's mortgage. Accordingly, the trial court correctly granted plaintiff's motion for summary disposition.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Karen M. Fort Hood
/s/ Alton T. Davis